Can the Supreme Court halt the ongoing expansion of vicarious liability? *Barclays* and *Morrison* in the UK Supreme Court.

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1. Introduction

In the last twenty years, vicarious liability in tort has undergone a transformation. From 2001,[1] the doctrine has expanded to include a wide category of relationships and tortious activities for which the defendant [D2] (usually the employer of the tortfeasor [D1]) will be held strictly liable. It is now clear that the doctrine applies to both intentional and non-intentional torts and that two key elements are required: [2]

- a *relationship* between D1 and D2 capable of giving rise to vicarious liability; and
- a *connection* that links the relationship between D1 and D2 and the tortious act or omission of D1.

Expansion of the doctrine has, perhaps unsurprisingly, brought uncertainty, as litigants test its boundaries. This has led to a rapid growth of cases, including six judgments from the House of Lords/Supreme Court between 2001-2017, three Privy Council decisions over the same period, and numerous Court of Appeal and lower court judgments. Attempts by the Supreme Court in 2012[3] to take stock of the law and provide greater guidance, and again in 2016,[4] have failed to stem the flow of cases. The Supreme Court itself has described vicarious liability as a doctrine 'on the move'[5] which has 'not yet come to a stop'.[6] In 2017,[7] the Supreme Court confirmed the ongoing expansion of the doctrine, which would now include foster parents caring for children on behalf of a local authority. Parallel to such developments, in 2013 the Supreme Court reviewed and reformulated the law relating to non-delegable duties which render the employer liable for the torts of independent contractors working for him or her, albeit on the basis of primary liability.[8]

Such a period of expansion has raised concerns how far the doctrine can be stretched. On 1 April 2020, the Supreme Court sought to answer this question, delivering two companion judgments addressing the question of the relationship [*Barclays Bank plc v Various Claimants* (*Barclays*[9]] and connection [*Wm Morrison Supermarkets plc v Various Claimants (Morrison)*[10]]

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[1] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 1 AC 215 (*Lister*).

[2] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1, hereafter *CCWS*, para 21.

[3] *CCWS ibid*.

[4] *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660 (*Cox*), *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11; [2016] AC 677 (*Mohamud*).

[5] *CCWS supra* n 2, para 19 per Lord Phillips.

[6] *Cox supra* n 4, para 1.

[7] *Armes v Nottinghamshire County Council* [2017] UKSC 60; [2018] AC 355 (*Armes*).

[8] *Woodland v Essex CC* [2013] UKSC 66; [2014] AC 537. On the tensions between vicarious liability and non-delegable duties, see S Deakin, 'Organisational torts: vicarious liability versus non-delegable duty' (2018) 77 CLJ 15; J Morgan, 'Vicarious liability for independent contractors?' (2015) 31 PN 235, and classically G Williams, 'Liability for Independent Contractors' (1956) 14 CLJ 180.

[9] [2020] UKSC 13; [2020] AC 973.

[10] [2020] UKSC 12; [2020] AC 989.

giving rise to vicarious liability. The same five judges decided both cases.[11] In the words of Lady Hale in *Barclays*, the time had come to see 'how far that move can take it'.[12] Without doubt, these are significant decisions; potentially the most important decisions since *Lister* or at least *CCWS*. They seek, once and for all, to provide guidance on the application of the relationship and connection tests for vicarious liability and respond to criticism (both judicial and academic) that the doctrine was being applied too generously;[13] criticism that has included courts internal and external to the UK.[14] Crucially, both decisions seek to constrain the expansion of the doctrine by adopting more restrictive interpretations of both the relationship and connection requirements. They further address the theoretical foundations of vicarious liability and the impact of sexual abuse cases on the development of the doctrine. An unstated, but implicit, aim is to stem the tide of vicarious liability cases.

This article, while welcoming the Supreme Court's decision to provide greater guidance in this area of law, will seek to examine the extent to which the UK Supreme Court is likely to succeed in its goals. It will do so in three stages, first by examining how *Barclays* has clarified the relationship test, second by examining how *Morrison* has corrected misunderstandings about the connection test, and finally by reviewing the impact of these cases more generally on this area of the law of tort. In so doing, it will answer two crucial questions. First, do these decisions mark a new era for vicarious liability claims or will the uncertainties of the last 20 years continue? Secondly, can *Barclays* and *Morrison* halt once and for all the ongoing expansion of vicarious liability?

2. Understanding the relationship test: *Barclays Bank v Various Claimants*

It is undisputed that, in the vast majority of cases, the relationship that gives rise to vicarious liability will be that of employer and employee.[15] However, as the Supreme Court made clear in the *Catholic Child Welfare* case (*CCWS*), in a minority of cases, relationships 'akin to employment' will also satisfy the relationship test.[16] It is this category that has caused controversy in that it extends vicarious liability to parties who are technically independent contractors. This is significant in that it is long established that vicarious liability does not apply to the acts of independent contractors.[17] The breadth of the 'akin to employment' category will therefore be important in determining the scope of the doctrine and the dividing line between employees on one hand, and true independent contractors for whom vicarious liability does not apply. Case-law has resolved that where the worker is performing on behalf of an enterprise (as opposed to his or her own behalf) and his or her activities are integrated

[11] Lady Hale and Lords Reed, Kerr, Hodge and Lloyd-Jones JJSC.
[12] *Barclays Bank supra* n 9, para 1.
[13] See, for example, J Plunkett, 'Taking stock of vicarious liability' (2016) 132 LQR 556 and P Morgan, 'Certainty in vicarious liability: a quest for a chimaera?' (2016) 75 CLJ 202, 205 who stressed the need for the courts to establish the limits of vicarious liability and provide greater certainty to litigants. See also P Giliker, 'Vicarious liability in the Supreme Court' (2016) 7 UKSC Yearbook 152.
[14] See, notably, the critical decision of the High Court of Australia in *Prince Alfred College v ADC* [2016] HCA 37; (2016) 258 CLR 134. Lower courts in England and Wales have also expressed concern that the boundaries of this form of strict liability continue to prove difficult to identify, see, for example, Judge Cotter QC in *Bellman v Northampton Recruitment Ltd* [2016] EWHC 3104 (QB); [2017] ICR 543, para. 46 (his concerns validated when his decision was later overturned by the Court of Appeal: [2018] EWCA Civ 2214).
[15] *CCWS supra* n 2, para 35.
[16] Approving the 'impressive' leading judgment of Ward LJ in *JGE (or E) v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] QB 722.
[17] *D & F Estates Ltd v Church Comrs* [1989] AC 177, 208 per Lord Bridge; *Salsbury v Woodland* [1970] 1 QB 324, 336 per Widgery LJ.

into the organisational structure of that enterprise, then, despite the absence of a formal contract of employment, vicarious liability will apply.[18] On this basis, a priest (an office-holder) may be regarded as akin to an employee of a bishop;[19] brother teachers in a religious school akin to employees of the religious organisation.[20] The Supreme Court in later decisions confirmed that even prisoners serving in the prison kitchen as part of their rehabilitation could be regarded as 'akin to employees' (*Cox v Ministry of Justice*[21]), as were foster parents volunteering[22] to undertake the care of children placed under local authority control (*Armes v Nottinghamshire CC*[23]).

In *Barclays*, the Supreme Court faced once again the question of the scope of 'akin to employment' relationship. Would it extend to a doctor who undertook, as a minor part of his practice, health checks for existing or potential employees of Barclays Bank? These were conducted in the doctor's consulting room in his own home. The bank would arrange the appointment with the doctor (now deceased) and ask him to fill in a form which contained their logo and was entitled, 'Barclays Confidential Medical Report'. While not paid a retainer, the doctor had been paid a fee per examination. In a group action, 126 claimants alleged that Barclays should be found vicariously liable for sexual assaults committed during these examinations between 1968 and 1984. The doctor was not a bank employee, but he was a worker entrusted with the task of ensuring that the bank hired fit and healthy employees who could be recommended for life insurance at ordinary rates under the Bank's pension scheme. Was the doctor then 'akin' to a Barclays' employee?

At first instance and in the Court of Appeal, a positive response had been given. Irwin L.J. in the Court of Appeal had gone so far as to question the existence of any 'bright line' test between independent contractors and employees. While such a distinction might make the law clearer and less complex, he noted, 'ease of business cannot displace or circumvent the principles now established by the Supreme Court.'[24] The Supreme Court in *Barclays*, however, disagreed. Importantly, it reasserted the classic distinction between work done for an employer as part of the business of that employer and work done by an independent contractor as part of the business of that contractor.[25] Extending vicarious liability to relationships 'akin to employment', it stated, did not erode this key distinction. The focus of the courts should be on the details of the parties' relationship and, fundamentally, whether the tortfeasor was carrying out his own independent business. On the facts, the doctor was not, in the view of the Court, 'anything close to an employee', but rather equivalent to a window-cleaner hired to clean the bank's windows or an auditor hired to audit its books.[26] The Court also noted that the doctor had been free to refuse an examination should he wish to do so: 'He was in business on his

[18] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006] QB 510, para 79 per Rix LJ.
[19] *JGE supra* n 16.
[20] *CCWS supra* n 2. This is in addition to the vicarious liability of the School itself for its teachers.
[21] *Cox supra* n 4.
[22] Only expenses are covered in such arrangements.
[23] *Armes supra* n 7.
[24] [2018] EWCA Civ 1670; [2018] IRLR 947, para 61. Silink argues that the decision breached the wall that had historically been set around independent contractors: A Silink, 'Vicarious Liability of a Bank for the Acts of a Contracted Doctor' (2018) 34 PN 46.
[25] *Barclays Bank supra* n 9, paras 22-24
[26] This may be regarded as a bit of an exaggeration given the doctor's role in the Barclays Bank recruitment process (as opposed to a window cleaner for whom Barclays is just another client). It is perhaps best to regard this comment as indicative of the Court's emphatic rejection of the reasoning of the courts below.

own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the Bank'.[27]

In advocating a more pragmatic approach that focuses on the details of the parties' relationship, the Supreme Court was encouraging a move towards a more cautious, incremental approach. Two key threads underlie this judgment which merit greater consideration and will be examined in detail below. First, the Court sought to provide guidance on the line to be drawn between employees/those akin to employees and independent contractors. Secondly, the Court addressed head on the role policy should play in determining the scope of the 'akin to employment' test. In *CCWS*,[28] Lord Phillips had highlighted five policy factors that would indicate when it was fair, just and reasonable to find a relationship 'akin to employment'. These have proven influential, not least in permitting the courts to justify extensions of the 'akin to employment' relationship. In reviewing the role of policy, the Court was seeking to establish the limits of the relationship needed to establish vicarious liability. As Lord Steyn stated in *Bernard v AG of Jamaica*, '[t]he principle of vicarious liability is not infinitely extendable.'[29]

(i) Identifying employees, those 'akin to employees' and independent contractors

It is trite law that vicarious liability does not apply to independent contractors. Lord Sumption in *Woodland v Essex CC* in 2013 confidently stated that '[t]he boundaries of vicarious liability have been expanded by recent decisions … But it has never extended to the negligence of those who are truly independent contractors'.[30] Yet what, we may ask, is the difference between 'true' independent contractors and 'false' independent contractors who are now treated as akin to employees? This question was addressed by the Supreme Court in *Cox* and *Armes*, which found assistance in addressing the policy factors highlighted by Lord Phillips in *CCWS*, namely who has deeper pockets; whether the worker was undertaking a task delegated by the employer; whether the worker was integrated into business activity of the employer; whether the employer created the risk of wrongdoing; and the level of control.[31] In *Armes*, these policy factors encouraged a generous approach. Vicarious liability could be justified, then, on the basis that foster parents were an integral part of child protection services in that they discharged the caring duties of local authority by looking after children in care. They could not, in the Court's view, be seen as carrying on an independent business of their own. In so finding, the Court placed emphasis on the fact that the local authority's placement of children in care with foster parents had created the risk of abuse, it had exercised powers of approval, inspection, supervision and removal without any parallel in ordinary family life, and that most foster parents had insufficient means to be able to meet a substantial award of damage.[32] Given the complex nature of the fostering relationship, undoubtedly policy here helped tip the relationship into the category of 'akin to employment'.[33] This raised the question: how far should this reasoning be stretched? The subsequent case of ***Kafagi v JBW Group***

[27] *Barclays Bank supra* n 9, para 28.
[28] *CCWS supra* n 2, para 35.
[29] [2004] UKPC 47; [2005] IRLR 398, para 23.
[30] [2013] UKSC 66, para 3.
[31] *CCWS supra* n 2, para 35. There seems some divergence between the view in *Cox* (stated by Lord Reed) that the five factors stated by Lord Phillips are not all equally significant, downplaying control and deeper pockets (para 20), and *Armes*, where Lord Reed found all five policy factors to be helpful.
[32] *Armes supra* n 7, paras 59-63.
[33] Contrast the position in Canada where vicarious liability is denied (*KLB v British Columbia* 2003 SCC 51, (2003) 230 DLR (4th) 513) and in New Zealand where the courts found it necessary to rely on agency to impose vicarious liability: *S v Attorney General* [2003] NZCA 149; [2003] 3 NZLR 450.

Ltd[34] represented an attempt to extend the 'akin to employment' relationship beyond that of *Armes*. It was left for the Court of Appeal to confirm that a judicial services company which had sub-contracted the collection of council tax debts to a self-employed bailiff (Boylan) was not vicariously liable for the actions of its sub-contractors. Boylan had paid his own bond to the court, could work for whosoever he chose, hired his own assistant, and maintained his own indemnity insurance. As the Court commented, he was more a potential competitor to the company than someone integrated within its business.[35] What is worrying about *Kafagi* is not the decision (which is obviously correct), but the fact that what should have been a straightforward 'true' independent contractor case reached the Court of Appeal. It is worth noting that, in giving leave to appeal to the Court of Appeal, the court had given as its reason uncertainty present in the law.[36]

The Supreme Court in *Barclays* sought, therefore, to provide reassurance that the distinction between employees/akin to employees and independent contractors remains and can be identified with some degree of clarity. To determine a relationship 'which makes it *proper* for the law to make the one pay for the fault of the other',[37] parties should focus on the details of the relationship and its closeness to that of employment. The Lord Phillips five policy factors are relegated to 'doubtful cases' where assistance is needed to determine whether the relationship is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. This represents a retrenchment and an attempt to adopt a more principled, predicable approach. As Lady Hale mildly remarked:

> There appears to have been a tendency to elide the policy reasons for the doctrine of the employer's liability for the acts of his employee … with the principles which should guide the development of that liability into relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability. [38]

It is important to note that, in so doing, *Barclays* is not attacking the 'akin to employment' category of relationships, but rather seeking to clarify its scope. The UK courts have rightly recognised that changing patterns of employment have brought a need for employment and tort law to recognise that workers may be part of the workforce of an organisation even if they are not hired under a contract of employment. The law must adapt in the face of the increasing complexity and sophistication of enterprises in the 21st century where workers may be hired via agencies on insecure short-term or temporary contracts. In recognising the realities of the gig economy, then, legal rules must evolve and the creation of a category of workers 'akin to employees' represents a response to such change. This does not mean, however, that 'true' independent contractors do not continue to exist. Where it is clear that the worker is carrying on his own independent business, policy should have no role. *Barclays* fundamentally asserts that, in most cases, the courts should focus on the facts of the relationship, not policy.[39]

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[34] [2018] EWCA Civ 1157.
[35] *Kafagi ibid*, para 53.
[36] Permission to appeal being granted on 6 February 2017 by Floyd LJ. Note also the concerns of the Singapore Court of Appeal in *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58, paras 63-64 per Menon C.J that the Supreme Court decisions pre-2020 might be interpreted to overturn the accepted view that there is no vicarious liability for independent contractors, noted by D Tan (2018) 134 LQR 193.
[37] *Barclays Bank supra* n 9, para 1 per Lady Hale for the Court. Emphasis added.
[38] *Barclays Bank supra* n 9, para 16.
[39] D Nolan, 'Reining in vicarious liability' (2020) 49 ILJ 609, 616-617 argues, however, that in emphasising the distinction between employers and independent contractors, courts will need to be alert to the fact that there will be an incentive for employers to seek to pre-empt vicarious liability by dressing their workers in the clothing of contractors rather than employees.

If we review previous case-law, it seems clear that the priests and brother teachers will continue to satisfy this test; the Court of Appeal in *JGE*, for example, examining in detail whether the factual relationship of priest and bishop could be categorised as akin to that of employment.[40] Equally, there seems little issue with the prisoner in *Cox* who was effectively doing a job equivalent to that of a prison employee. *Armes*, however, is a different story. Local authorities do employ staff to look after children in care. Foster parents are a distinct category.[41] The Court described *Armes* as 'the most difficult case',[42] and we might regard it as an exemplar therefore of the doubtful case category where assistance is needed to determine whether the relationship is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. *Armes* does, however, highlight the potential Achilles' heel of *Barclays*. To what extent will the category of 'doubtful cases' permit the courts to continue to extend the relationships giving rise to vicarious liability?

(ii) Policy, Doubtful Cases and the Relationship Test

As stated above, *Barclays* clarified that it is only in doubtful cases that the five policy 'incidents' identified by Lord Phillips in *CCWS* will be helpful in identifying a relationship 'akin to employment'.[43] While this indicates that such cases should be exceptional, it is self-evident that the wider the scope of this exception, the more policy will continue to intrude into the 'akin to employment' test. *Armes*, as argued above, would appear to fall into this category. The majority in that case found that the foster parents were not, in fact, operating their own business, but this conclusion was reinforced by reference to policy.[44] How, then, do we identify 'doubtful' cases? Will not any barrister struggling to establish a relationship giving rise to vicarious liability argue that hers is a doubtful case? We might argue that such cases should be confined to those which are borderline, but what makes a borderline case?

Logically, a borderline case will arise where the claimant can establish the essential minimum of the employee relationship (that is, that the tortfeasor is acting as an integral part of the defendant's enterprise),[45] but where uncertainty remains whether it is sufficiently analogous to that of a conventional employment relationship. Interpreted narrowly, this seems consistent with Lady Hale's overall approach in *Barclays*, but the question is whether courts will adhere to a narrow approach. One further factor not discussed in *Barclays* is whether the courts will be more inclined to regard cases as 'doubtful' where sexual abuse is alleged, given the sensitivity of such claims and the flexible approach taken in previous case-law. The first post-*Barclays* case offers some support for the latter suggestion. Here, the High Court faced a claim of abuse by a lay night watchman working for a religious school.[46] The facts were similar to those found in *CCWS* but with a crucial difference. In *CCWS*, dual vicarious liability had been found where teachers, who were religious brothers, had abused pupils in the school (divided between the school managers and the religious foundation of which the brothers were

[40] *JGE supra* n 16, paras 74-81 per Ward LJ.
[41] For the complex issues involved with fostering, see P Morgan, 'Ripe for reconsideration: Foster carers, context, and vicarious liability' (2012) 20 Torts LJ 110.
[42] *Barclays Bank supra* n 9, para 23.
[43] *Barclays Bank supra* n 9, para 27.
[44] Contrast Lord Hughes (dissenting) who argued that fostering commits children in care to independent carers and is the equivalent to the authority placing the children in a specialist home run by a different authority or by a charity: *Armes supra* n 7, para 88.
[45] *Cox supra* n 4, para 24.
[46] *JXJ v The Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB), noted by AJ Bell and J McCunn, 'Professional negligence in 2020: The year in review' (2021) 37 PN 5, 9.

members). Here, the culprit was a lay member of staff with no religious affiliation. The Court rightly saw this as straightforward – any claim of vicarious liability would be against the school alone. All that could be shown was that the religious organisation exercised considerable de facto control over the operation and organisation of the *school*, rather than individual lay employees.[47] In such a case, there can be little doubt on the relationship question, but nevertheless the court did proceed to justify its conclusion by referencing the five Phillips policy incidents.[48] Was this over-caution or a sense that such a review will always be wise in abuse cases? If the latter, will this be confined to sexual abuse cases or extend to physical abuse given that in many cases both allegations are made?

It is likely therefore that the courts will face future challenges to the boundaries of the law and that policy arguments will continue to be raised. While labelling *Armes* a difficult case may be read as implicit disapproval of its reasoning, indicating its limited utility as a basis for future case-law development, *Armes* is not overturned. This leads to two conclusions. First, that *Barclays* indicates that a more cautious approach should be taken to the 'akin to employment' relationship and that the starting point should be the details of the parties' relationship. Second, that, despite its best efforts, *Barclays* is unlikely to prevent further attempts to expand the relationship concept.

3. Understanding the connection test: *Morrison Supermarkets v Various Claimants*

In *Morrison*, in contrast, the Supreme Court sought to provide guidance as to the operation of the connection test**.** In so doing, the Court both revisited the test and sought to correct any misunderstandings that might have arisen from its 2016 decision in *Mohamud* leading to concerns that the test was too lenient. Both elements will be examined more closely below.

(i) Identifying a connection: Close or sufficient?

The connection test is fundamental to the doctrine of vicarious liability in that it both determines the scope of the doctrine and the reason why employers (rather than any other defendant) are held liable. Prior to *Lister v Hesley Hall*, the Salmond test had been used. This test imposed vicarious liability where the tort could be said to be a wrongful and unauthorised mode of doing some task authorised by the employer.[49] Faced with a claim for sexual abuse, which could not legitimately be described as a wrongful mode of doing one's job, the House of Lords in 2001 opted for a broader test. In the words of Lord Steyn, vicarious liability would arise where the employee's torts could be said to be so closely connected with his employment that it would be fair and just to hold the employers vicariously liable.[50] Lord Millett offered an alternative (arguably slightly narrower) formulation: are the unauthorised acts of the employee so connected with acts which the employer has authorised that they may properly be

[47] McKinstry was therefore regarded as an integral part of the work, business and organisation of the School, but not of the Institute: *ibid*, para 140 per Chamberlain J.
[48] *Ibid*, para 144.
[49] Introduced by Sir John Salmond in the first edition of *Salmond on Torts* (London: Stevens and Haynes, 1907), pp 83–8 and repeated in later editions. Salmond also advised that vicarious liability would arise if the tortious behaviour had been expressly or impliedly authorised by the employer, although this might be regarded as primary, rather than secondary, liability.
[50] *Lister* [2001] UKHL 22, para 28.

regarded as being within the scope of his employment?[51] Both versions of the test were endorsed by Lord Nicholls in the later case of *Dubai Aluminium.*[52] Lord Toulson, however, in *Mohamud* preferred a different formulation, arguing that it was desirable to simplify the essence of the test:

> In the simplest terms, the court has to consider two matters. The first question is what functions or 'field of activities' have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. … Secondly, the court must decide whether there was *sufficient* connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice.[53]

In the case itself, Lord Toulson found a racist attack by a kiosk attendant on a customer on the garage forecourt amounted to a foul-mouthed and violent means of ensuring Mohamud left his employer's premises. The attendant's racist motivation was deemed irrelevant. Equally, applying a test of 'sufficient' connection, a drunken punch at a post-Christmas party drinking session was regarded as 'in the course of one's employment',[54] as was a fight and a chase around a building site culminating with one labourer striking another with a scaffolding pole.[55] Lord Phillips in the earlier case of *CCWS* had also highlighted that, in abuse cases at least, in applying the connection test, the creation of risk policy factor was always likely to be important.[56] In so doing, his Lordship had drawn on Canadian case-law (which had been approved in *Lister*[57]) which asked whether the risk of wrongdoing had been created or materially increased by the nature of the defendant's enterprise. Lord Toulson went further in *Mohamud* (a decision concerning physical, not sexual, abuse): 'The risk of an employee misusing his position is one of life's unavoidable facts.'[58]

Mohamud raised concerns amongst commentators that a test based on sufficient connection and risk would be far too readily satisfied. It was condemned by the High Court of Australia in *Prince Alfred College v ADC*[59] on this basis. The HCA favoured a more restrictive test that focused on the particular features of the parties' relationship and whether they provided the occasion for the wrongful act.[60] Courts, in its view, should search for principle rather than formulate policy. *Mohamud*, on this basis, had been wrongly decided.[61]

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[51] *Lister ibid*, para 69. Lord Steyn opined, however, in *Bernard v AG of Jamaica supra* n 29, para18 that 'the four substantial opinions delivered in *Lister* revealed that all the Law Lords agreed that [his version] stated the right question', indicating he saw no difference between the two versions.

[52] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, para 23. See also Lord Nicholls' judgment in *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34; [2007] 1 AC 224.

[53] *Mohamud supra* n 4, paras 44-45 (emphasis added).

[54] *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214; [2019] ICR 459: sufficient connection where the managing director had been exerting his authority in a drunken argument at 3am. It was not merely a question of a group of drunken revellers whose conversation had turned to work.

[55] *Levitt v Euro Building and Maintenance Contractors Ltd* [2019] EWHC 2926 (QB) where the fact that the assault was carried out in the workplace, following an argument about work materials, using work equipment, was enough to convince the court that this was not a frolic case. This sets the bar very low indeed. Cf *Graham v Commercial Bodyworks Ltd* [2015] EWCA Civ 47.

[56] *CCWS supra* n 2, para 87.

[57] See *Bazley v Curry* [1999] 2 SCR 534; (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71. These decisions were described as 'luminous and illuminating' in *Lister v Hesley Hall supra* n 1: para 27 per Lord Steyn, although the House of Lords at that time was more equivocal about their underlying reasoning.

[58] *Mohamud supra* n 4, para 40.

[59] *Prince Alfred College* [2016] HCA 37, (2016) 258 CLR 134 (a sexual abuse case).

[60] *Prince Alfred College ibid*, para 81.

[61] *Ibid*, para.83, citing favourably Morgan's criticism of *Mohamud supra* n 13.

The application of the 'sufficient' connection test and the role of the policy came to the fore in *Morrison*. Here a senior auditor (Skelton), employed by Morrison Supermarkets, had a grudge against his employer and had used his home computer to place confidential data about Morrison employees on the internet. The employees, whose data had been disclosed, sued Morrison for breach of the statutory duty under the Data Protection Act 1998, misuse of private information, and breach of confidence. The Court of Appeal found Morrison to be vicariously liable for Skelton's torts. His tortious acts in sending the claimants' data to third parties were found to be within the field of activities assigned to him by Morrison. This was regardless of the fact that Skelton's motive had been to harm Morrison (and vicarious liability would assist him in this goal).[62] The Supreme Court disagreed. Skelton had been pursuing a personal vendetta. His wrongful conduct 'was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment.'[63]

The language used by the Court is significant and should be read carefully. The connection is no longer described as 'sufficient' but 'close'.[64] The connection is to 'acts which [Skelton] was authorised to do'. This is the tighter formulation used by Lord Millett in *Lister* and Lord Nicholls in *Dubai Aluminium*, not the broader formula of Lord Toulson in *Mohamud*. This terminological shift is far from accidental. Having examined how the close connection test had been expressed in *Lister* and *Dubai Aluminium*, the Court determined that the simpler version of the test in *Mohamud* had not been intended to change the content of the test. Lord Toulson's judgment had to be read in context.[65] It was not, as commentators had suggested, indicative of a move towards a test of temporal or causal connection between the employment and wrongdoing, nor setting out a broad test of social justice. If, therefore, *Mohamud* is read in the light of *Lister* and *Dubai*, Skelton's disclosure of data could not be seen as part of his field of activities. While there was a causal connection between his post and the tort, this would not satisfy a test of close connection.

(ii) Mohamud: Not wrong, but misunderstood …

The language of the Court in *Morrison* is one of reassurance. *Mohamud* was not wrongly decided, just misunderstood. In moving from 'sufficient' back to 'close' connection, the Court was simply seeking to correct any misunderstandings a simplified version of the connection test may have caused. I would strongly argue, however, that *Morrison* disguises a potentially radical judgment in sheep's clothing. The misunderstandings in question are fundamental in nature, relating to the nature of the connection test itself. Reference to 'sufficient connection' in *Mohamud* had been viewed by both commentators and the lower courts as an attempt to relax the 'close' connection test. Plunkett, post-*Mohamud*, for example, had argued that, in view of the apparently liberal understanding of the connection test in *Mohamud*, 'findings that an employee was on a "frolic of their own" are now bound to be few and far between'.[66] First

[62] [2018] EWCA Civ 2339; [2019] QB 772, paras 72-76.
[63] *Morrison supra* n 1, para 47 per Lord Reed.
[64] It is worrying that the first post-*Morrison* decision applied the *Morrison* test but still referred to it as a test of 'sufficient connection': *Chell v Tarmac Cement and Lime Ltd* [2020] EWHC 2613 (QB). This may be a one-off mistake given the pre-*Morrison* terminology of the pleadings and case appealed, but *Chell* does highlight the need for practitioners and the courts alike to recognise that *Morrison* does require a change of language and a different approach to the connection test.
[65] *Morrison supra* n 10, paras 26-28.
[66] J Plunkett, 'Taking stock of vicarious liability' (2016) 132 LQR 556, 561. See also D Ryan, '"Close connection" and "akin to employment": Perspectives on 50 years of radical developments in vicarious liability' [2016] *Irish Jurist* 239, 247.

instance and appeal courts (including those in *Morrison*) had treated Lord Toulson's broad and evaluative approach as authoritative.[67] *Morrison*, however, directs us back to the earlier formulation of the 'close' connection test in *Dubai Aluminium* which is both narrower and, significantly, resembles the most conservative formulation of the test stated in *Lister*. In so doing, the Court was able to blow out of the water suggestions that the connection test might be based on causation or opportunity.

Further 'misunderstandings' related to the question of motive and policy. In *Mohamud*, Lord Toulson had commented that 'Mr Khan's motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there'.[68] This had encouraged the claimant in *Morrison* to argue that Skelton's motive to harm Morrison should, on this basis, be disregarded. In rejecting this argument, the Court argued that Lord Toulson's words needed to be placed in context. His statement that the motive was irrelevant did not mean … that motive is irrelevant. Rather it was irrelevant on the facts of *Mohamud*. This clearly needs unpacking. The Court argued that having already determined that Khan was acting in his capacity as an employee, Lord Toulson was merely stating that why he chose so to act did not matter.[69] Motive, then, is relevant where the question whether the employee is acting in his capacity as an employee is still open, for example, where he or she had not been engaged in furthering the employer's business but had been pursuing his own interests (as was the case in *Morrison* itself). Such reasoning makes sense if you consider *Lister* itself. It is only possible to conclude that sexual abuse is closely connected to authorised acts that furthered the employer's business if one casts to one side the issue of the employee's personal motivation in committing the acts in question. Similar issues arise in theft cases.[70] If we accept this reasoning and impose vicarious liability, then we must also accept that the key question becomes that of the capacity in which the employee acts. Unfortunately, this may not be as clear-cut as *Morrison* envisages. For example, post-*Morrison*, are we all now convinced that Mr Khan was acting to further his employee's business thus rendering his motive irrelevant? Or rather was he a racist attacking a random individual who just happened to be a customer turning up at his workplace?

Finally, the Court addressed misunderstandings as to the relevance of the Phillips five policy factors. They did not, stated the Court, concern both stages of the vicarious liability test but are confined to the 'akin to employment' test (with an exception made for sexual abuse cases that require a tailored response).[71] This is a very narrow reading of *CCWS*, but does have the required effect of removing a key feature that permitted extensions to the connection test. On this basis, in *Morrison*, a non-sexual abuse case, the Phillips policy factors would be irrelevant.

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[67] See, for example, *Morrison* [2018] EWCA Civ 2339 and [2017] EWHC 3113 (QB); [2019] QB 772 and *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214. *Bellman* was not overturned by the Supreme Court which, *supra* n 10, para 46, acknowledged that while the Court of Appeal in that case had to a certain extent misunderstood *Mohamud*, nevertheless the correct result had been reached, in that there was a very close connection between the managing director's authorised activities as an employee and his commission of the assault

[68] *Mohamud supra* n 4, para 48.

[69] Similarly, Lord Toulson's reference to 'an unbroken sequence of events' and 'a seamless episode' were not indicative of a test of temporal or causal connection and to read them as such would be to read them out of context. They merely referred to the question of the capacity in which Mr Khan was acting when the events in question took place: *Morrison supra* n 10, para 28.

[70] *Lloyd v Grace, Smith & Co* [1912] A.C. 716 (where employee's personal motivation of greed was ignored).

[71] *Morrison supra* n 10, paras 23 and 36. This was a necessary concession given the dicta of Lord Phillips in *CCWS*, stated above (see text around n 56).

Stepping back, what are we to make of such reasoning? At the very least, the Supreme Court is interpreting the *Mohamud* test as conservatively as possible. However, I would argue that the judgment goes further than this. What is described as a 'clarification' of the connection test essentially restates the test, using the wording of Lord Nicholls in *Dubai Aluminium*. Indeed, taking 'policy' out of the connection test might be regarded as a radical step indeed. In drawing on *Dubai Aluminium*, the Supreme Court advocated not simply a narrower test, but also a more principled-form of case-law development. Judges should in future:

> … consider how the guidance derived from decided cases furnishes a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed. Following that approach, cases can be decided on a basis which is principled and consistent.[72]

Although the HCA decision in *Prince Alfred College* is not mentioned (which, it may be recalled, argued that *Mohamud* had been wrongly decided), the Supreme Court's approach is reminiscent of the Australian court's advocacy of principled case-law development rather than free-wheeling policy. As I have argued elsewhere,[73] the decision in *Prince Alfred College* represented an attempt by an apex common law court to provide a test which, if applied in a clear and structured way, would permit the incremental and controlled growth of vicarious liability and provide guidance for the lower courts. The UK Supreme Court in *Morrison* appears similarly motivated. While not adopting the 'occasion' test of the Australian courts,[74] *Morrison* places faith in incremental legal development from decided cases.

The question is whether this will suffice to constrain the courts. For some, *Morrison* amounts to little more than a practical call for judges not to be daring.[75] I am not so pessimistic but remain concerned that the legitimate goal of seeking to place principle above policy may be undermined by the decision not to overturn *Mohamud* and *Mohamud*-influenced cases. In seeking to view *Mohamud* as merely misunderstood, two consequences arise. First, English law is left with a category of 'awkward' cases that it will struggle to explain away. As stated above, some commentators, including myself, still find it difficult to view the rehabilitated *Mohamud* as representing a case where Mr Khan's racist abuse was closely connected to acts he was authorised to do. Equally, in suggesting cases involving sexual abuse, which are unquestionably affected by policy, should be treated as a separate category of claims, risk-based reasoning survives for another day and future courts will now have to resolve how to treat this category of claims. Given that many cases will involve allegations of both physical and sexual abuse, this is not necessarily the neat division envisaged by the Court[76] and essentially leaves a door open for future case-law development. In the face of authority applying risk-based reasoning in non-sexual abuse cases (which has not been overturned), can such reasoning be confined to one pocket of claims? One wonders whether the Supreme Court will live to regret this suggestion.

A second consequence, I would argue, is more fundamental. Legal scholars and practitioners working in this field will have read the *Mohamud* judgment in its entirety and diligently

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[72] *Morrison supra* n 10, para 24. See also Lord Nicholls in *Dubai Aluminium supra* n 52, para 26.
[73] P Giliker, 'Analysing institutional liability for child sexual abuse in England and Wales and Australia: Vicarious liability, non-delegable duties and statutory intervention' (2018) 77 CLJ 506, 533.
[74] *Prince Alfred College supra* n 59, para 81, which identified matters such as authority, power, trust, control and the ability to achieve intimacy with the victim as relevant concerns.
[75] A Bell, '*Plus ça change, plus c'est la* vicarious liability' (2020) 36 PN 150, 155: 'Application of the [Supreme Court's] ideas to any particular case may well remain as much of a lottery as before.'
[76] To be cynical, will a mere allegation of some sexual impropriety suffice to access this tailored test?

followed its application by the courts. The Supreme Court, despite its lack of citation of commentary, was clearly aware of criticism that the Toulson simplified test was too generous and that the lower courts were interpreting the connection test extremely liberally (as evidenced by the lower courts in *Morrison* itself). Any such critique represents part of a constructive and legitimate debate as to the scope of vicarious liability. To respond to such concerns on the basis they represent a 'misunderstanding' of the law and derive in part from reading judgments out of context represents a matter of concern. As common lawyers, we rely on our apex courts for guidance. We are taught at an early age to identify the *ratio decidendi* of a case and to construe precedent carefully. We trust, therefore, our courts to provide the guidance that will enable us to interpret the common law. If a Court can simply argue at a later date that its express words have been misunderstood and taken out of context, then there is a danger that this relationship of trust will be detrimentally affected. It creates uncertainty in the law and encourages legal challenge. As this article has shown, objectively, it is misleading to suggest that *Morrison* merely explains *Mohamud* to a confused audience. It changes the law. The reality is that *Mohamud* represented a false step in the law. It should therefore have been overturned in favour of a more traditional interpretation of the 'close connection' test. It may be argued that this, de facto, is what the Supreme Court has achieved, albeit in a more subtle and tactful fashion without the embarrassment of formally overturning its previous decision. I have no doubt that this is the intention of the Court. Subtlety and tact, however, come at a price.

4. Assessing the impact of *Barclays* and *Morrison*

As I have shown, *Barclays* and *Morrison* represent a potential turning point for vicarious liability. Having been 'on the move' for so many years, the Supreme Court has indicated that it is time to slow down and adopt a more measured approach. Principle is emphasised over policy in both cases. Examination of the facts of the relationship and the duties allocated to the tortfeasor are stressed. The merits of a case-by-case incremental approach praised. However, as we have seen, by refusing to overturn the decisions in *Armes* and *Mohamud*, certain expansion joints persist. *Armes* heads a potential counter-offensive of 'doubtful' cases, which both re-introduce policy reasoning into the discussion and diminish the force of Lady Hale's argument that, in future, it should be the details of the relationship, not policy, that determine whether a relationship exists giving rise to vicarious liability. Equally, *Morrison* suggests that there will be a sub-category of sexual abuse cases where policy concerns will be relevant. The scope of these exceptions is ill-defined, and this will need to be resolved. Given the number of vicarious liability cases in recent years that have involved some form of sexual abuse, this latter category may potentially provide a significant exception to the general approach. As discussed earlier, it may also influence the first category of claims. The reason for the exceptions is self-evident: they permit the Court to explain away, rather than reverse, earlier case-law that is inconsistent with its general approach it advocates. The result, however, is to undermine to a certain extent its new framework by re-introducing a discussion of policy.

In this final section, I will address to what extent *Barclays* and *Morrison* provide clearer guidance for courts given the concerns stated above. This will be approached in two ways. First, I will revisit earlier cases where the 'akin to employment' and 'connection' tests proved difficult to apply and examine to what extent the courts will now find it easier to resolve these questions. As will be seen, both the cases discussed below highlight ongoing uncertainties that will need to be resolved. Secondly, given the development of non-delegable duties parallel to that of vicarious liability, I will assess the likely impact of these decisions on non-delegable

duties. Will a stricter relationship test encourage parties to pursue the non-delegable duty argument with greater rigour?

(i) Revisiting earlier case-law in the light of Barclays and Morrison

DSN[77] represents a case where the 'akin to employment' test was directly in point. Here, the High Court had been asked to determine whether a football scout, abusing a young boy during a tour of New Zealand, had been 'akin to an employee'. The culprit, Roper, was an unpaid volunteer whose role had been to spot and coach promising players below the minimum schoolboy signing age of 14 for Blackpool Football Club. Roper was later convicted of abusing boys in his care. As a volunteer, he was clearly not an employee, but Griffith J. held the relationship between the football scout and club 'akin to employment'. In examining the judgment, we see two strands. First, the court adopted fact-based reasoning. It stressed that, given the Football Club's dire financial state, it had been forced to rely on volunteers to act as scouts and these had played an essential role in discovering players that it could later sell on for profit, saving the Club potentially from insolvency. On this basis, Roper was integrated into the operation of the Club in that he was de facto an unpaid member of staff. Secondly, however, the court had stressed policy factors, notably that the credibility and power the Club gave Roper facilitated the abuse.[78] How would a future court respond to such a such a scenario? The question *DSN* raises is whether a court would now simply focus on the details of the relationship (e.g. the practical differences between, say, a Premier League club and a lower league team) or whether the abuse allegation would tip the analysis into a broader policy discussion, following in the steps of cases such as *CCWS* and *JGE*. Was *DSN* a doubtful case on the facts? At the very least, *DSN* indicates that courts will find it difficult to refrain from addressing policy concerns in this kind of case.

In contrast, the 2010 case of *Brink's Global Services Inc v Igrox Ltd*[79] involved the application of the connection test. Here, the Court of Appeal had found a *sufficiently* close connection between the employee's theft of silver bars from a container he was supposed to fumigate and his employment to make it fair and just that his employer should be held vicariously liable for his actions. This was not an abuse case, and so the *Morrison* general approach (no policy) would now apply. Reference would have to be made to decided cases to establish a principled and consistent approach. In *Brink's*, the Court of Appeal had rejected the argument that this was a case where the employment merely gave the employee the opportunity to steal. In so doing, however, it had been influenced by the fact that the theft from the very container the employee was instructed to fumigate could be regarded as a risk reasonably incidental to the purpose for which he was employed.[80] *Morrison* would advocate a less policy-orientated discussion: was the theft so closely connected with the authorised acts of the employee in that it furthered the employer's (rather than his own) business? Much here will rest on how we characterise the authorised acts of the employee. The employee was intended to have contact with the bars in the fumigation process. However, rather than fumigating the bars, he stole them. If we refer to the 'past' case of *Morrison*, we can see that Skelton similarly had been given access to employee data which he had misused to commit the tort. This was regarded as a mere opportunity case. In the light of *Morrison*, the correctness of *Brink's* seems questionable. It is possible to justify *Brink's* on the basis that the employee had been entrusted

[77] *DSN v Blackpool Football Club Ltd* [2020] EWHC 595 (QB).
[78] 'Blackpool, by giving Roper the "aura" … he had there … created the trust in Roper that allowed him to abuse the boys': *ibid*, para 160.
[79] [2010] EWCA Civ 1207; [2011] IRLR 343.
[80] *Brink's ibid*, para 30.

with the security of the silver bars in a manner that furthered his employer's own enterprise.[81] This was not, however, the reasoning of the Court that drew on more liberal authority including physical and sexual abuse cases.[82] This example is important in that it demonstrates both the difficulties of relying on decided cases and ongoing uncertainty in determining what is closely connected to authorised acts of the employee. At the very least, it demonstrates that in employing an incremental approach, some cases must be regarded as more authoritative than others. The selection process, however, remains a work in progress.

(ii) Impact on Non-Delegable Duties?

A further question left open by the Supreme Court is the possible impact of *Barclays* on non-delegable duties in tort. The expansion of vicarious liability was mirrored by the parallel development of non-delegable duties rendering employers personally liable for the torts of their independent contractors. As formulated by the Supreme Court in *Woodland v Essex CC,*[83] employers hiring workers to care for vulnerable parties in their care (in this case, a school hiring independent contractors to run its swimming lessons) might find themselves under a positive duty to protect a particular class of persons against a particular class of risks. This is regardless of the fact the contractors were neither employees, nor akin to employees. *Woodland* is still under development and there are, as yet, few cases on this point. One key point of uncertainty is whether the non-delegable duty will extend to intentional torts; *Woodland* itself concerning only negligence.[84] This factor, combined with the courts' pre-*Barclays* generous interpretation of the 'akin to employment' test, explains why litigants have had little incentive to date to pursue with any vigour the development of the non-delegable duty argument.[85] Vicarious liability will generally provide an easier option for claimants.

Will the 2020 decisions change this position, reviving the debate as to non-delegable duties? I am doubtful for three reasons. First, without a clear statement that *Woodland* will extend to intentional torts, the survival of *Armes* (albeit as a 'doubtful' case) suggests that abuse claims will continue to be framed as vicarious liability. While academics such as Tofaris[86] and Deakin[87] have argued that non-delegable duties provide a more suitable response to child abuse cases, *Armes* did not follow this path. *Barclays* confirms its status as based on vicarious liability. *Armes* also represents authority that it will be difficult to establish non-delegable duties against

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[81] Cf *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.

[82] eg *Mattis v Pollock* [2003] EWCA Civ 887; [2003] 1 WLR 2157 (physical assault) and *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441 (sexual abuse).

[83] *Woodland supra* n 8.

[84] Although Lord Reed in *Armes supra* n 7, para 51 commented – 'Nor am I able to agree that a non-delegable duty cannot be breached by a deliberate wrong' – this was obiter. There is some support for such a development, however, from doctrinal writers eg R Stevens, 'Non-Delegable Duties and Vicarious Liability' in JW Neyers, E Chamberlain and SGA Pitel, (eds), *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 361.

[85] See, for example, *Kafagi v JBW Group Ltd supra* n 34 where the non-delegable duty argument was not even raised. Arguably the non-delegable duty argument could have been argued in Barclays e.g. Barclays Bank, in employing young female staff and insisting they saw an independent contractor for a physical check-up, could be said to have owed a positive duty to ensure reasonable care was taken in the examination. However, given the uncertainty whether the non-delegable duty argument extends to sexual abuse and potential difficulties establishing an antecedent relationship, this was understandably not pursued. For an alternative suggestion of a claim against the bank for breach of implied contract terms, see P Watts, 'The travails of vicarious liability' (2019) 135 LQR 7.

[86] S Tofaris, 'Vicarious liability and non-delegable duty for child abuse in foster care: A step too far?' (2016) 79 MLR 871.

[87] S Deakin, 'Organisational torts: Vicarious liability versus non-delegable duty' (2018) 77 CLJ 15. See also C Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Oxford: Hart Publishing, 2019).

public authorities where the statutory framework under which the defendant operates might render any such duty unduly onerous.[88] Secondly, if, as is suggested in this article, the 'akin to employment' test continues to be interpreted generously in sexual abuse cases, then there is little incentive to argue for an extension to the non-delegable duty principle at least in this context. Finally, even for cases where it may now be more difficult to establish a relationship 'akin to employment', litigants will face an area of law that remains under-developed and inevitably lack of authority will discourage claims. This does not mean that non-delegable duties cannot be argued in conjunction with vicarious liability,[89] but that vicarious liability remains, in most cases, the stronger and more predictable option. At best, then, we can only say that the reining in of the relationship test might give encouragement to parties to raise non-delegable duties arguments, but it is hardly a game-changer.

5. Conclusion: Have *Barclays* and *Morrison* halted the ongoing expansion of vicarious liability?

As we have seen in this article, the clear intention of *Barclays* and *Morrison* was to slow down, if not halt, the expansion of vicarious liability. In particular, the UK Supreme Court in these cases sought to reduce the number of cases where policy could be used to justify future extensions of the doctrine. In so doing, the Court advocated a move towards a more principled, incremental approach. This will come as a great relief to many commentators, including myself, who have expressed increasing concern at the ongoing 'movement' of this strict liability doctrine. Such moves were based, undoubtedly, on the well-intentioned efforts of the courts to ensure vulnerable victims could access compensation, but ultimately failed to provide clear guidance for courts and placed an increasing burden on employers.

However, this article has argued that the Supreme Court has not been wholly successful in its aim and that there is a risk that *Barclays* and *Morrison* will fail to have the impact the Supreme Court anticipated. Notably, the decision to review rather than overturn earlier authority has required the Court to create exceptions where reference to policy (notably risk-based reasoning) is still permitted. It remains unclear exactly what defines a 'doubtful' case and I fully expect Counsel to test this matter in future cases. Future courts will also be left be determine the scope of the sexual abuse exception. By retaining *Mohamud*, the Court also creates uncertainty as to the meaning of 'furthering the interests' of one's employer and, in advising courts to refer to decided cases, fails to provide clear guidance which cases are authoritative. *Mohamud*, for example, is Supreme Court authority, but one that should now be interpreted in the light of *Morrison*. Cases such as *Brink's* (discussed above) will have to be construed narrowly if they are not to mislead. One is left with the conclusion that if the aim of *Morrison* is to stop expansion of the close connection test, this would have been better achieved by simply overruling *Mohamud* rather than seeking to rehabilitate it.

Barclays and *Morrison* are important decisions. They signify concern at the highest level that the doctrine of vicarious liability was being applied too generously by the courts. However, judicial tact and diplomacy have led to decisions that hold their punches. This article has

[88] See, for example, *Razumas v Ministry of Justice* [2018] EWHC 215 (QB); [2018] P.I.Q.R. P10 and *Hopkins (A child) v Akramy* [2020] EWHC 3445 (QB) where the High Court rejected the imposition of a non-delegable duty on prison authorities and a primary care trust respectively as inconsistent with the statutory framework within which they were operating.

[89] See eg *Ramdhean v Agedo* (unreported 28 January 2020, County Court (Leeds)): negligent treatment by member of a dental practice.

identified a number of points of uncertainty that these cases have created or, at best, failed to resolve. To answer the question posed by this article: has the UK Supreme Court halted the ongoing expansion of vicarious liability? It has certainly tried, but in view of the above analysis, it is unlikely to prevent further challenges by claimants eager to test the boundaries of vicarious liability. This is not to say that an attempt at a more principled and incremental approach is not to be welcomed nor that *Barclays* and *Morrison* do not represent much-needed intervention by the UK Supreme Court. However, the decision to 'correct' misunderstandings rather than overturn misleading case-law should be a concern to anyone working in this area of law.